

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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BONNIE KOHLERITER and LAURA
LEIGH,

Case No. 3:13-cv-00495-MMD-VPC

Plaintiffs,

ORDER

v.

SALLY JEWELL, et al.,

Defendants.

I. INTRODUCTION

This Order addresses the remaining issue raised in Plaintiffs' Emergency Motion for Temporary Restraining Order (dkt. no. 5). In their Motion, Plaintiffs request a temporary restraining order to prevent Defendants from infringing on their First Amendment rights to meaningful access to view Sheldon horses held in Virgin Valley temporary holding facilities. Based on the briefing and evidentiary hearing, this Court holds that Plaintiffs are not likely to succeed on the merits of their claim and accordingly denies their request for emergency temporary relief.

II. BACKGROUND

Plaintiffs Bonnie Kohleriter and Laura Leigh initiated this action on September 13, 2013, concerning the United States Fish and Wildlife Service's ("FWS") September 9-14, 2013, round-up of feral horses at the Sheldon Refuge. The First Amended Complaint alleges claims under the Administrative Procedure Act ("APA") (first claim for relief) and the First Amendment (second claim for relief) and a third claim for declaratory relief.

1 (Dkt. no. 3.) On September 17, 2013, Plaintiffs filed their Emergency Motion in which
2 they assert two claims for emergency relief: (1) that sending captured horses to J&S
3 Associates, Inc. ("J&S"), an adoption contractor, violates the APA; and (2) that the
4 Sheldon gather and holding procedures violate Plaintiffs' First Amendment rights. (Dkt.
5 no. 5.) The Court held a hearing on the Emergency Motion on Friday, September 27,
6 2013. (Dkt. no. 14.)

7 At the hearing, the Court denied Plaintiffs' request for emergency relief with
8 regard to Plaintiffs' APA claim. The Court found that Plaintiffs had not demonstrated a
9 likelihood of success on the merits. (Dkt no. 20.) The Court allowed the parties to file
10 supplemental briefing on Plaintiffs' APA claim and, after reviewing the briefing, declined
11 to reconsider its order. (Dkt. no. 27.)

12 Concerning Plaintiffs' First Amendment claim, the Court found that the First
13 Amendment claim relating to the gathering of Sheldon horses was moot for the purpose
14 of emergency relief as the gather had already been completed and it is undisputed that
15 no other gather is scheduled to occur at the Sheldon Refuge until 2014. (Dkt. no. 13 at
16 3.) The Court found that Plaintiffs' First Amendment claim regarding Plaintiffs' viewing
17 access to the captured horses, some of which are scheduled to remain at the Virgin
18 Valley temporary holding facilities throughout October (dkt. no. 13 at 13–14), is ripe for
19 review, and required the Court to hear evidence on the factors established in *Press-*
20 *Enterprise Co. v. Superior Court of California for Riverside (Press-Enterprise II)*, 478
21 U.S. 1 (1986). The Court held an evidentiary hearing on October 10, 2013, in which both
22 parties had the opportunity to present evidence on each of the *Press-Enterprise II*
23 factors.

24 **III. LEGAL STANDARD**

25 **A. Temporary Restraining Order**

26 Federal Rule of Civil Procedure 65 governs preliminary injunctions and temporary
27 restraining orders, and requires that a motion for temporary restraining order include
28 "specific facts in an affidavit or a verified complaint [that] clearly show that immediate

1 and irreparable injury, loss, or damage will result to the movant before the adverse party
2 can be heard in opposition,” as well as written certification from the movant’s attorney
3 stating “any efforts made to give notice and the reasons why it should not be required.”
4 Fed. R. Civ. P. 65(b).

5 Temporary restraining orders are governed by the same standard applicable to
6 preliminary injunctions. See *Stuhlbarg Int’l Sales Co. v. John D. Brush & Co.*, 240 F. 3d
7 832 n.7 (9th Cir. 2001). Further, a temporary restraining order “should be restricted to
8 serving [its] underlying purpose of preserving the status quo and preventing irreparable
9 harm just so long as is necessary to hold a hearing, and no longer.” *Granny Goose*
10 *Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers Local No. 70*, 415 U.S. 423, 439
11 (1974).

12 A temporary restraining order may be issued if a plaintiff establishes: (1) likelihood
13 of success on the merits; (2) likelihood of irreparable harm in the absence of preliminary
14 relief; (3) that the balance of equities tips in his favor; and (4) that an injunction is in the
15 public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). “Injunctive
16 relief [is] an extraordinary remedy that may only be awarded upon a clear showing that
17 the plaintiff is entitled to such relief.” *Id.* at 22. The Ninth Circuit has held that “‘serious
18 questions going to the merits’ and a hardship balance that tips sharply toward the
19 plaintiff can support issuance of an injunction, assuming the other two elements of the
20 *Winter* test are also met.” *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1132
21 (9th Cir. 2011).

22 **B. Applicable Law**

23 *Press-Enterprise II* provides the test for determining whether there is a qualified
24 First Amendment right of access for the press and public to observe governmental
25 activity and whether that right was infringed upon. See *Leigh v. Salazar*, 677 F.3d 892,
26 899-900 (9th Cir. 2012). In step one, the court must employ a two-part “experience” and
27 “logic” test in order to determine if there is a qualified right. *Press-Enterprise II*, 478 U.S.
28 at 1, 8-9; see also *U.S. v. Guerrero*, 693 F.3d 990, 1000 (9th Cir. 2012). The court asks

(1) “whether the place and process have historically been open to the press and general public” and (2) “whether public access plays a significant positive role in the functioning of the particular process in question.” *Press-Enterprise II*, 478 U.S. at 1, 8–9. The government may overcome the qualified First Amendment right established in prong one of the *Press-Enterprise II* test by demonstrating “an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.” *Id.* at 9.

IV. DISCUSSION

A. Qualified Right: Experience Requirement

The experience prong of the First Amendment test considers whether “the place and process have historically been open to the press and the general public.” *Id.* at 8. The requirement “does not look to the particular practice of any one jurisdiction, but instead ‘to the experience in that *type* or *kind* of hearing throughout the United States.’” *El Vocero de P.R. v. Puerto Rico*, 508 U.S. 147, 150 (1993) (per curiam) (*quoting Rivera-Puig v. Garcia-Rosario*, 983 F.2d 311, 323 (1st Cir. 1992)).

The Court initially notes that this is not a case in which Defendants have failed to provide any access. The parties agree that the public is not wholly prohibited from viewing the holding facilities. The public can view the facilities from: (1) a public access road (Virgin Valley Road); and (2) an adjacent rock dyke.¹ Defendants’ witness John Kasbohm testified that the closest viewing point from these public areas to the holding facilities is approximately 500 feet. Defendants have represented to the Court that in addition to the viewing areas, they have attempted to provide further access through a one-time two-hour guided tour of the holding facilities. The guided tour was canceled due to the lapse in appropriations, but Defendants stated that if appropriations were to

¹While Plaintiffs do not characterize their ability to use the access road and adjacent dyke as “access,” they acknowledge that the two areas are available for all members of the public to use, including those interested in viewing the horse holding facilities.

1 be restored, as they have been, the guided tour would be rescheduled.² Given these
2 viewing opportunities, the question is not whether historical access to holding facilities
3 has been provided at wildlife refuges, but whether more proximate access has been
4 given.

5 Plaintiffs submitted testimonies at the evidentiary hearing aimed at demonstrating
6 that: (1) the Sheldon Refuge has historically provided greater access to horse holding
7 facilities than is currently being offered; and (2) wildlife refuges in other parts of the
8 country provide the public with greater access to horse holding facilities than is currently
9 available at Sheldon. However, Plaintiffs have failed to show that greater access to
10 horse holding facilities has been provided historically at either Sheldon Refuge or other
11 national wildlife refuges.

12 **1. Experience at the Sheldon Refuge**

13 Plaintiffs introduced evidence intended to demonstrate that the Sheldon Refuge
14 has allowed greater public access in the past and that the current regulations are
15 uniquely restrictive. Plaintiffs presented testimonies from three witnesses concerning
16 Sheldon's historical access: Lesley Neuman, Marla Jo Bennett, and Kathryn Pickett.
17 While each witness provided testimony demonstrating that some members of the public
18 had been given more proximate access from 2001-2006, this access appears to have
19 been reserved for: (1) volunteers who signed volunteer agreements; and (2) individuals
20 interested in adopting horses.

21 Marla Jo Bennett, a former employee of FWS who worked at the Sheldon Refuge
22 as a Refuge Operations Specialist from 2001-2006, testified that volunteers signed
23 agreements with FWS and were at the Sheldon Refuge in order to contribute their horse
24 expertise to the FWS gather activities. Leslie Neuman was a volunteer at the Sheldon
25 Refuge in October 2004 and August 2005, a fact that was demonstrated by her
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27 ²The Court fully expects that given the government's restoration of appropriations,
28 Defendants will immediately reschedule the guided tour.

1 testimony that she believes she signed a volunteer agreement and that she was at the
2 Sheldon Refuge in order to "help out." Kathryn Pickett was also a volunteer at the
3 Sheldon Refuge in August 2005 and she testified that she was there helping the
4 veterinarian. The testimony of both Ms. Neuman and Ms. Pickett was focused on the
5 access to horses given to volunteers, not general members of the public or press.
6 Volunteers who have signed volunteer agreements with the federal government are
7 certainly distinguishable from interested members of the public and members of the
8 press at issue in this case.

9 Plaintiffs' witnesses also testified that individuals interested in adopting Sheldon
10 horses were given privileged access. At the time of Ms. Bennett's employment at the
11 Sheldon Refuge, FWS was responsible for finding each gathered horse an adoptive
12 home. In order to do so, it was necessary to show potential adopters the horses. That
13 practice has changed. FSW now sends horses to adoption contractors who handle the
14 individual adoptions and, therefore, individual adopters are no longer a priority for
15 Sheldon staff. Ms. Bennett testified explicitly that potential adopters are distinguishable
16 from members of the general public or press. When asked if FWS restricted the access
17 given to members of the public, Ms. Bennett stated: "I mean, there were restrictions. The
18 general public could not just wander back there. But if they were thinking of adopting and
19 had an appointment, we could always show them back there."³

20 None of Plaintiffs' witnesses testified that the Sheldon Refuge has ever had a
21 policy of allowing the public viewing access that was superior to what is currently
22 provided. Indeed, several of Plaintiffs' witnesses testified that there has been a curtain of
23 secrecy surrounding Sheldon. Ms. Leigh testified that Sheldon has completely precluded
24 the public since 2006. Ms. Bennett testified that in her experience from 2001-2006, FSW

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26 ³Ms. Bennett also indicated in her testimony that general members of the public
27 may have been proximate to captured horses on a few occasions in the past. While the
28 testimony is ambiguous on this point, evidence that members of the public happen to
have had such access occasionally in the past does not establish that the refuge has
been historically open.

1 “never wanted the public to have access. They wanted it all hidden.” Terri Farley, an
2 author of fact-based fiction about wild horses, testified that the Sheldon Refuge is
3 “behind the curtain.” She stated that “[t]here is this iron curtain out there . . . there are
4 very few photographs, even, of the horses out at Sheldon.” Ms. Farley continued that
5 during the nineties she was invited to Sheldon by a BLM employee but that the invitation
6 was then retracted. Ms. Farley concluded that preclusion of the public “is not brand-new.
7 I am under the impression it’s gotten worse” but that “[a]ll we’re getting out of Sheldon is
8 hearsay.” Defendants’ witness John Kasbohm, the Project Leader for Sheldon Refuge,
9 also testified that the public has never been given access to the administrative facilities
10 at Sheldon, although he also admits that he lacks personal knowledge about access
11 permitted before 2011.

12 Plaintiffs therefore have failed to demonstrate that Sheldon has historically
13 provided greater access to the press and public to view captured horses in holding
14 facilities than the current access offered by Defendants.

15 2. Experience at Other National Wildlife Refuges

16 In the absence of evidence that the Sheldon Refuge has historically provided
17 greater access to its horse holding facilities than it is currently, Plaintiffs may fulfill the
18 experience prong of *Press-Enterprise II* by demonstrating access to holding areas on
19 other national wildlife refuges. See *El Vocero de P.R.*, 508 U.S. at 150.

20 Plaintiffs’ only testimony regarding other wildlife refuges was from Ms. Leigh and
21 Ms. Farley. Ms. Leigh testified that she maintains a database called “Keep Them in the
22 Wild” that catalogues horses on national wildlife refuges across the United States. Ms.
23 Leigh testified that in compiling the database she has examined photos on a Corolla
24 horse website. She explained that the website’s photos were taken exclusively by
25 members of the public. She did not provide any details concerning the proximity of the
26 photographers to the horses, the timeframe within which the photographs were taken,
27 who created the website, or who specifically took the photographs. Ms. Leigh’s
28 statement that the public has had access to Corolla horses cannot alone establish that

1 other wildlife refuges provide the access Plaintiffs seek in this case. Nor does Ms.
2 Farley's testimony support Plaintiffs' claim that other national wildlife refuges provide
3 greater public access to captured horses in their holding facilities. Ms. Farley testified as
4 to her experiences at other wildlife refuges, but she admitted that she has not had
5 access to temporary holding facilities to view captured horses during or after a horse
6 gather. Plaintiffs' evidence of historical access at other wildlife refuges fails to satisfy the
7 experience prong.

8 Based on the evidence presented, the Court finds that Plaintiffs cannot
9 demonstrate that they have a qualified right of access under *Press-Enterprise II*. The
10 Court thus concludes that Plaintiffs cannot demonstrate the likelihood of success on their
11 First Amendment claim upon which they base to seek emergency temporary relief for
12 greater access to the Virgin Valley temporary holding facilities.

13 **V. CONCLUSION**

14 Plaintiffs have not demonstrated that they are likely to succeed on their claim that
15 they have a qualified First Amendment right to greater access to view the holding
16 facilities at Sheldon Refuge. In order to establish likelihood of a qualified right, Plaintiffs
17 must show that the place and process have historically been open to the press and
18 general public and that such access plays a positive role in the process' functioning.⁴
19 Plaintiffs have not shown that, historically, members of the general public have been
20 given greater viewing access than has been provided to Plaintiffs. The Court therefore

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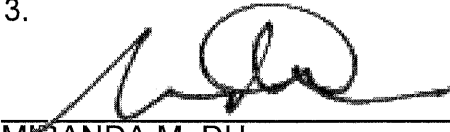
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27 ⁴The Court notes that Plaintiffs presented extensive testimony concerning the
28 public's positive role in horse gather activities on FWS land. The Court agrees that public
access to the holding facilities is important to the function of the gather.

1 does not find likelihood of success on the merits.⁵ Plaintiffs' Emergency Motion (dkt. no.
2 5) is denied.

3 ENTERED THIS 18th day of October 2013.

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6 MIRANDA M. DU
UNITED STATES DISTRICT JUDGE

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25 ⁵As the Court noted at its hearings on September 27, 2013, and October 10,
26 2013, the Court has serious concerns about whether the government's measures are
27 indeed narrowly tailored. The viewing areas provided to the general public and press
28 appear to have been chosen merely for the government's convenience as they were
areas already made open to the public. However, as Plaintiffs have failed to establish
likelihood of success on their claim that they have a qualified right, the Court will not
consider, at this stage, whether Defendants' restrictions were narrowly tailored to a
legitimate government interest.